*Harris v. Green Tree Financial Corp.**

I. INTRODUCTION

In the 1980s, the Supreme Court of the United States reinterpreted the Federal Arbitration Act (FAA)[1] and stated that it "create[d] a 'liberal federal policy favoring arbitration.'"[2] As a result, arbitration has become a commonplace method of dispute resolution in many different arenas; one arena in which arbitration is being utilized with controversy and increasing frequency is within the consumer-lender or consumer-vendor relationship. Many lenders and vendors currently are including arbitration clauses into standardized lending and retail installment contracts as a means to efficiently resolve their disputes with consumers dissatisfied with services rendered to them or with the terms of an agreement.

While the inclusion of arbitration agreements may be beneficial to the lender,[3] consumer advocates are quick to point out that such agreements have serious adverse effects upon how consumers are able to protect themselves against duplicity on the part of a lender or vendor.[4] Indeed, consumers frequently challenge the validity of such clauses when embroiled in a dispute with vendors or lenders because they are often more favorable to vendors and lenders, as such clauses provide vendors and lenders with dispute resolution options outside the arbitration process while limiting consumers to just arbitration.

Harris v. Green Tree Financial Corp.[5] involved a challenge to the validity of an arbitration clause as described above. In *Harris*, the

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* 183 F.3d 173 (3d Cir. 1999).

[1] 9 U.S.C. §§ 1–16 (1994).

[2] Frederick L. Miller, *Arbitration Clauses in Consumer Contracts: Building Barriers to Consumer Protection*, 78 MICH. B.J. 302, 302 (1999) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

[3] Some of the advantages of arbitration include the following: (1) arbitration theoretically is a cheaper means of dispute resolution than the judicial system; (2) parties have control over the procedural rules of resolution; (3) arbitration improves the ability of the winning party to enforce its judgment; and (4) arbitration allows parties to select their arbitrator. *See* Andrew Guzman, *Capital Market Regulation in Developing Countries: A Proposal*, 39 VA. J. INT'L L. 607, 640–43 (1999).

[4] *See* Alan S. Kaplinsky & Mark J. Levin, *Anatomy of an Arbitration Clause: Drafting and Implementation Issues Which Should Be Considered by a Consumer Lender*, *in* CONSUMER FINANCIAL SERVICES LITIGATION 1999, at 655, 657 (PLI Corporate Law and Practice Course Handbook Series No. 1113, 1999); *see also infra* text accompanying note 47.

[5] 183 F.3d 173 (3d Cir. 1999).

plaintiffs, lower-middle class consumers, challenged the validity of an arbitration agreement that was a part of a standardized contract between themselves and the defendants, comprised of the Green Tree Financial Corporation, one of its subsidiaries, and several home-improvement contractors.[6] An examination of the decision of the United States Court of Appeals for the Third Circuit in *Harris* is instructive regarding the manner in which two competing interests—a federal interest favoring arbitration and the interest in fostering consumer protection—have become entangled as a result of using arbitration in consumer contracts and elucidates the different legal rationales that courts have employed to validate or invalidate such arbitration agreements in this context.

II. FACTS AND PROCEDURAL HISTORY OF *HARRIS*

On February 14, 1997, Charles Harris, Christine Harris, Willie Davis, and Nora Wilson (the Harrises) brought a claim in the United States District Court for the Eastern District of Pennsylvania against Green Tree Financial Corporation (Green Tree), Green Tree Consumer Discount Company (GT Discount), Lawrence M. Coss, Green Tree's Chief Executive Officer, and building contractors Fredmont Builders, P. Angelo & Son's, Inc., Frank R. Lucci, Jr., and Tyrone DeNittis, alleging that the named defendants collectively had victimized them through a fraudulent home improvement scheme.[7]

The alleged fraudulent home improvement scheme purportedly operated as follows. Green Tree recruited dozens of home improvement contractors through direct marketing techniques for the purpose of obtaining high interest rate secondary mortgage contracts from homeowners.[8] Green Tree allegedly instructed the contractors to offer their services for home improvements primarily to middle-income and low-income senior citizens in exchange for secondary mortgage contracts.[9] Furthermore, Green Tree allegedly instructed the contractors to market themselves as home improvement dealers who had been approved by both the Federal Housing Authority and the U.S. Department of Housing and Urban Development and to promise customers that the home improvements would be performed

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[6] *See id.* at 176.

[7] *See id.*

[8] *See id.*

[9] *See id.*

at an affordable cost and that payment would not have to be tendered by the customers until they were completely satisfied.[10]

Using "high-pressure sales tactics" such as "in-home sales and telemarketing," the contractors solicited business from the Harrises.[11] As a predicate to commencing work on the Harrises' homes, the relevant contractor allegedly presented the Harrises with several standardized loan contracts for signature, including a secondary mortgage contract, and the Harrises obliged.[12] The secondary contracts signed by the Harrisses included the following arbitration clause in small print on the back and near the bottom of the contracts:

> ARBITRATION—All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY US (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under the case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief. Notwithstanding anything hereunto the contrary, we retain an option to use judicial or non-judicial relief to enforce a mortgage, deed of trust, or other security agreement relating to the real property secured in a transaction underlying this arbitration agreement, or to enforce the monetary obligation secured by the real property, or to foreclose on the real property. Such judicial relief would

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[10] *See id.*

[11] *Id.*

[12] *See id.*

> take the form of a lawsuit. The institution and maintenance of an action for judicial relief in a court to foreclose upon any collateral, to obtain a monetary judgment or to enforce the mortgage or deed of trust, shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in the contract, including the filing of a counterclaim in a suit brought by us pursuant to this provision.[13]

Thus, the arbitration clause required that the Harrises arbitrate any claims against Green Tree and the other defendants, while preserving Green Tree's right to bring a lawsuit to enforce their rights under the mortgage contract. The contractors allegedly sold and assigned the loans and mortgages to Green Tree or GT Discount immediately after the Harrises signed them.[14]

Thereafter, the Harrises alleged that the contractors either failed to perform the work specifically promised in the contracts or performed the work promised in the contracts but in an unsatisfactory manner.[15] The Harrises complained to Green Tree regarding the unsatisfactory work by the contractors on several occasions, all of which apparently were disregarded by Green Tree.[16] Despite their dissatisfaction with the work done by the contractors, the Harrises nonetheless paid Green Tree according to the terms of the contracts for fear of losing their homes.[17]

As a result of the alleged fraudulent conduct of Green Tree and the other defendants, the Harrises brought suit alleging a violation of the Racketeer Influenced and Corrupt Organization Act (RICO)[18] and the Pennsylvania Unfair Trade Practices and Consumer Protection Law.[19] The Harrises also alleged the common-law claims of breach of contract, unjust enrichment, promissory estoppel, breach of fiduciary duty, tortious interference with a contract, fraudulent misrepresentation, and negligent misrepresentation.[20]

Responding to the Harrises' suit, Green Tree and the other defendants moved the court to compel arbitration pursuant to the arbitration clause

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[13] *Id.* at 177–78.

[14] *See id.* at 176–77.

[15] *See id.* at 177.

[16] *See id.*

[17] *See id.*

[18] 18 U.S.C. §§ 1961–1968 (1994); *see also Harris*, 183 F.3d at 177.

[19] 73 PA. CONS. STAT. ANN. §§ 201-1 to 201-9.3 (West 1993 & Supp. 1999); *see also Harris*, 183 F.3d at 177.

[20] *See Harris*, 183 F.3d at 177.

elucidated above.[21] Furthermore, Green Tree requested a stay on all proceedings regarding the suit until completion of the arbitration proceedings.[22]

The Harrises filed an opposing motion against arbitration on May 30, 1997, arguing that the arbitration clause was invalid and unenforceable for the following reasons: (1) the arbitration clause lacked the requisite mutuality; (2) the arbitration clause was unconscionable; and (3) the arbitration clause could not be enforced because the Harrises had been fraudulently induced to enter the contract.[23]

After a hearing on Green Tree's motion to compel arbitration, the trial court denied the motion to arbitrate, claiming that the arbitration clause "purports to bind only one of the contracting parties, the plaintiff borrower" and "leaves [Green Tree] free to litigate their claims if they wish to do so"; the court further classified the contract as a "one-sided arrangement" that was "unconscionable."[24] Thus, the trial court found that the arbitration clause of the secondary mortgage contract lacked the requisite mutuality and furthermore found the arbitration clause as procedurally and substantively unconscionable.[25] When the trial court denied their motion, Green Tree and the other defendants appealed.

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[21] *See id.*

[22] *See id.*

[23] *See id.* at 178.

[24] *See id.* (alteration in original).

[25] *See id.* Procedural unconscionability pertains to the process through which a contract has been made between parties and the form of such contract. *See id.* at 6 (citing E. ALLAN FARNSWORTH, CONTRACTS § 4.28, at 332–34 (2d ed. 1990). This type of unconscionability often involves unexpected terms in the boilerplate language of a contract, *see id.* (citing Germantown Mfg. Co. v. Rawlinson, 491 A.2d 138, 145–46 (Pa. Super. Ct. 1985)), or contractual terms that are not expected by the party that is expected to assent to such terms, *see Rawlinson*, 491 A.2d at 146–47. Substantive unconscionability pertains to contractual provisions between two parties which are extremely unfavorable to one party and to which the unfavored party does not assent. *See Harris*, 183 F.3d at 181 (citing Denlinger, Inc. v. Dendler, 608 A.2d 1061, 1068 (Pa. Super. Ct. 1992)). The trial court held that the arbitration agreement was a "one-sided arrangement" and was thus "unconscionable." Harris v. Green Tree Fin. Corp., No. 97-1128, 1997 WL 805254, at *1 (E.D. Pa. Dec. 17, 1997), *rev'd*, 183 F.3d 173 (3d Cir. 1999).

III. DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Third Circuit first addressed the issue of whether the arbitration clause was unenforceable due to a lack of mutuality[26] and reversed the decision of the trial court.[27] The court declined to adopt the requirement of complete equivalency of obligation on the part of the parties,[28] stating that "[m]odern contract law largely has dispensed with the requirement of reciprocal promises, however, provided that a contract is supported by sufficient consideration."[29] Citing its decision in *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*,[30] the court stated that mutuality is not required for a valid arbitration clause.[31] The court further stated that its holding that arbitration agreements do not require mutuality is consistent with federal and state law and that the state of Pennsylvania does not require an agreement of equivalent obligation for a valid contract.[32]

The Third Circuit also ruled against the plaintiffs regarding the issue of whether the arbitration provisions were procedurally and substantively

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[26] The doctrine of mutuality maintains that in order for a contract to be valid, both parties to said contract must exchange reciprocal promises. *See* FARNSWORTH, *supra* note 25, § 3.2, at 113.

[27] *See Harris*, 183 F.3d at 184. Generally, questions regarding the construction of arbitration clauses and agreements are questions of federal law. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983). However, federal courts may apply state law pursuant to section 2 of the FAA, thus allowing a party questioning the validity of an arbitration agreement to apply contract defenses (e.g., lack of consideration or unconscionability) without contravening federal law. *See Harris*, 183 F.3d at 179 (citing Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).

[28] *See Harris*, 183 F.3d at 180.

[29] *See id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981)).

[30] 585 F.2d 39 (3d Cir. 1978). In *Becker*, an American company (Becker Autoradio U.S.A., Inc.) disputed the validity of an arbitration clause of their contract with a West German company (Becker Autoradiowerk GmbH) because the arbitration clause enabled the West German company to invoke arbitration in either an American or a German court, while it could invoke arbitration only in an American court. *See id.* at 42. Becker Autoradio U.S.A., Inc. argued that Becker Autoradiowerk GmbH's ability to choose a forum for the resolution of disputes constituted a lack mutual obligation. *See id.* at 47 n.15. The Third Circuit declined to find a requirement of equivalency of obligation for contracts under federal law, stating that such an argument has "no support in logic, reason or precedent." *Id.*

[31] *See Harris*, 183 F.3d at 180.

[32] *See id.* at 180-81.

unconscionable.[33] Regarding procedural unconscionability, the court held that the fact that the arbitration clause was in fine print on the reverse side of the standard form contracts that the Harrises signed did not make the arbitration clause procedurally unconscionable, because such contracts were still within the plain view of the Harrises.[34] Regarding substantive unconscionability, the Third Circuit held that an unequal balance of bargaining power in an arbitration arrangement does not in itself make the arbitration clause unconscionable.[35] Furthermore, the court held that the FAA provided the Harrises with the option to petition the court to appoint an arbitrator if they did not consent to Green Tree's choice.[36] Thus, the

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[33] *See id.* at 183–84.

[34] *See id.* at 182. The Harrises presented the argument that the arbitration agreement was unconscionable because the clause was in fine print on the reverse side of the relevant standard form contracts and because the arbitration clauses were absent from the work orders that the defendants required them to sign before the defendants would commence work. *See id.* The court utilized both federal and state law to find the arbitration agreement enforceable, contrary to the arguments presented by the Harrises. *See id.* at 182–83. The court cited two cases decided by the Federal District Court for the Eastern District of Pennsylvania, *Troshak v. Terminix International Co.*, No. CIV.A.98-1727, 1998 WL 401693 (E.D. Pa. July 2, 1998), and *McCullough v. Shearson Lehman Brothers, Inc.*, Nos. CIV.A.86-2752 to 86-2758, CIV.A.87-1431 to 87-1435, CIV.A.87-1499, CIV.A.87-1576 to 87-1579, CIV.A.1644, 1988 WL 23008 (W.D. Pa. Feb. 18, 1988), which supported the court's general proposition that an arbitration clause not printed in a prominent part of a contract, but nonetheless within the clear and plain view of the opposing party, is valid. *See Harris*, 183 F.3d at 182. The court also rationalized its decision using state law, citing *Standard Venetian Blind Co. v. American Empire Insurance Co.*, 469 A.2d 563 (Pa. 1983), in which the Pennsylvania Supreme Court held that a failure to read the contract or a lack of knowledge of a clearly drafted contractual provision does not provide grounds for the avoidance of the contract, *see id.* at 566; *see also Harris*, 183 F.3d at 182.

[35] *See Harris*, 183 F.3d at 183 (citing Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 229 (3d Cir. 1997) (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991))). The Harrises presented the argument that the arbitration agreement was substantively unconscionable because the agreement granted Green Tree the option of litigating its disputes while limiting the Harrises to arbitration as a means to resolve their dispute and because the arbitration agreement permitted Green Tree to obtain an arbitrator without the Harrises' consent. *See id.* The court cited federal case law such as *Peacock*, 110 F.3d at 229, to support its holding that inequality in bargaining power is not in itself enough to justify a finding of unconscionability. *See Harris*, 183 F.3d at 183.

[36] *See Harris*, 183 F.3d at 183–84. The court based this conclusion upon the following language from section 5 of the FAA:

Third Circuit reversed and remanded the case to the District Court with directions to grant the defendants' motion to stay and to enforce the arbitration agreement.[37]

IV. ANALYSIS

The Third Circuit's holding enforcing Green Tree's arbitration clause, interestingly enough, comes on the heels of *Randolph v. Green Tree Financial Corp.—Alabama*,[38] in which the United States Court of Appeals for the Eleventh Circuit found an arbitration clause nearly identical to the arbitration clause at issue in *Harris* unenforceable.[39] In *Randolph*, the arbitration clause in controversy was part of a retail installment contract for the purchase of a mobile home between the plaintiff, Larketta Randolph, and Better Cents Home Builders, Inc.[40] Green Tree Financial Corporation—Alabama, a wholly-owned subsidiary of Green Tree, was an assignee of the retail installment contract between Randolph and Better Cents Home Builders, Inc.[41] As part of the retail installment contract, Green Tree required Randolph to obtain "vendor's single interest" insurance;[42] however, Green Tree failed to mention this requirement as part of their Truth in Lending Act[43] disclosure.[44]

> If in the [arbitration] agreement provision be made for a method of naming or appointing an arbitrator . . . [,] such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator . . . [,] then upon the application of either party to the controversy the court shall designate and appoint an arbitrator . . . who shall act under the said agreement with the same force and effect as if he . . . had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 5 (1994); *see also Harris*, 183 F.3d at 184 & n.10. Thus, the court interpreted the above language as a manifestation of the Harrises' right to petition to appoint an arbitrator under section 5 of the FAA.

[37] *See Harris*, 183 F.3d at 184.

[38] 178 F.3d 1149 (11th Cir. 1999).

[39] *See id.* at 1151, 1159.

[40] *See id.* at 1151.

[41] *See id.*

[42] "Vendor's single interest" insurance operates to protect a lien holder or a vendor against the costs of repossession should default occur. *Id.* at 1151.

[43] 15 U.S.C. §§ 1601 *et seq.* (1994 & Supp. III 1997). The Truth in Lending Act is a consumer protection statute that regulates the disclosure of credit terms by creditors

Randolph brought suit against Green Tree Financial Corporation—Alabama and Green Tree, alleging violations of the Truth in Lending Act on the part of the defendants for, inter alia, failing to disclose their requirement of vendor's single interest insurance and the requirement that all claims be subject to arbitration[45] as set forth in the retail installment

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and provides for remedial measures for consumers against creditors who do not comply with the regulations of the statute. *See id.* The purpose of the statute is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against unfair credit billing and credit card practices." *Id.* § 1601(a).

[44] *See Randolph*, 178 F.3d at 1151; *see also* 15 U.S.C. §§ 1631–1637a (setting forth the Truth in Lending Act's disclosure requirements).

[45] The arbitration clause in controversy provided as follows:

> 17. ARBITRATION: All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire Contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s). This arbitration Contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes will be subject to binding arbitration in accord with this Contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the Contract . . . [including] money damages, declaratory relief, and injunctive relief. Notwithstanding anything hereunto the contrary, Assignee retains an option to use judicial or non-judicial relief to enforce a security agreement relating to the Manufactured Home secured in a transaction underlying this arbitration agreement, to enforce the monetary obligation secured by the Manufactured Home or to foreclose on the Manufactured Home . . . . The initiation and maintenance of an action or judicial relief in a court [on the foregoing terms] shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this Contract, including the filing of a counterclaim in a suit brought by Assignee pursuant to this provision.

Randolph, 178 F.3d at 1151 (alterations in original).

contract.[46] In reply to Randolph's claim, counsel for the defendants filed a motion to compel arbitration pursuant to the arbitration agreement.[47] The district court granted the defendants' motion to compel arbitration, and Randolph appealed.[48]

In reversing the district court's decision, the Eleventh Circuit held that the arbitration clause was unenforceable because the clause defeated the remedial purpose of the Truth in Lending Act by potentially exposing the consumer to bear the costs and expenses of the arbitration hearings.[49] Because the arbitration clause "provides no guarantee that a consumer successfully arbitrating under this clause will not be saddled with a prohibitive costs order,"[50] the court rationalized that the arbitration clause would essentially defeat a customer's "ability to vindicate her statutory rights [under the Truth in Lending Act]."[51]

The similar facts and conflicting holdings of *Harris* and *Randolph* illustrate a looming problem with the use of arbitration clauses as a part of consumer contracts. On the one hand are business and lending institutions which increasingly are using standardized arbitration language in their consumer contracts as a means for swift and cost-effective devices to resolve disputes with their customers.[52] On the other hand are consumers, who, like the Harrises and Larketta Randolph, often are unsophisticated and unfamiliar with what, precisely, arbitration entails and the possible ramifications arbitration can have on their ability to resolve conflicts with lendors or vendors. Indeed, consumer advocates are clamoring against the use of standardized arbitration clauses in consumer contracts because of the effects such clauses have upon a consumer's ability to protect himself from unfair deceptive practices or from defective products.[53]

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[46] *See id.* at 1151–52.

[47] *See id.* at 1152.

[48] *See id.* The district court judge also declined Randolph's request for certification of a class of individuals who had entered into similar agreements with Green Tree and dismissed Randolph's case with prejudice. *See id.*

[49] *See id.* at 1157.

[50] *Id.* at 1158.

[51] *Id.*

[52] *See* Miller, *supra* note 2, at 302.

[53] *See id.* Consumer advocates are wary of the use of arbitration clauses in consumer contracts for the following reasons: (1) as a practical matter, consumers often do not negotiate the contracts they sign (which are often "take it or leave it" contracts) and therefore do not have any real choice but to arbitrate; (2) the costs of arbitration are often exorbitant, particularly in light of the amounts typically in dispute in

The arguments of the plaintiffs against the enforceability of the arbitration clause in *Harris* and the Eleventh Circuit's rationale for deeming the arbitration clause in *Randolph* unenforceable reflect one legal approach that consumers have adopted to invalidate arbitration clauses—to argue that the clause is simply unfair, or, in legal terms, unconscionable.[54] Given the disparate holdings of the courts in *Harris* and *Randolph* regarding nearly identical arbitration clauses by the same lending institution, one easily can come to the conclusion that the success of a challenge against the validity of an arbitration clause by a consumer now and in the future will depend upon how consumers set out to prove that an arbitration clause is substantively unconscionable and which theories are available to the consumer.

As explained above, the plaintiffs in *Harris* attempted to prove the substantive unconscionability of their arbitration agreement by arguing that their consent to arbitrate lacked mutual consideration to arbitrate from Green Tree.[55] An analysis of recent arbitration law indicates that the *Harris* decision is in line with many federal and state jurisdictions that are

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consumer matters; (3) there is no judge or a jury in arbitration and thus a sense of "fairness" is lost; (4) the American Arbitration Association advises its arbitrators that no written explanation of their decisions is required and there is virtually no opportunity to appeal an arbitrator's decision because appeal requires a showing of fraud or corruption; (5) a lack of public access to arbitration proceedings shields the process from public scrutiny for possible abuses in the system; (6) there is very limited access to discovery in the arbitration process, which potentially hinders consumers' ability to prove fraudulent activity; (7) it is unclear whether class actions may be brought in arbitration proceedings; and (8) it is unclear whether arbitration actions will provide for attorney's fees for consumers which are available to successful consumers under certain consumer protection legislation. *See id.* at 303-04.

[54] According to Miller, there are three "exceptions," elucidated from recent precedent, to the general rule that arbitration clauses are enforceable that a consumer can proffer, as follows: (1) the arbitration clause is not applicable to the relevant dispute; (2) the FAA does not apply to the contract, allowing relevant state law to apply; and (3) the arbitration clause is invalid. *See id.* at 304. The last of the three elucidated arguments is founded upon the language of section 2 of the FAA, which provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1994).

[55] *See* Harris v. Green Tree Fin. Corp., 183 F.3d 173, 178 (3d Cir. 1999). While mutuality and substantive unconscionability sometimes are identified as two separate theories to attack an arbitration agreement, these theories "overlap[] substantially" in the sense that the imbalance of bargaining power characterized as substantively unconscionable directly results from the lack of mutuality in an arbitration agreement. *Id.* at 183. Thus, this author treats a lack of mutuality as an argument of substantive unconscionability.

reluctant to strike down an arbitration agreement simply because of a lack of mutuality or because of a weakness in the procedural machinery of the agreement.[56]

Driving the decisions of the courts in those cases involving a lack of mutuality argument is the policy of favoring arbitration as a means of dispute resolution.[57] Perhaps courts addressing the arguments of plaintiffs like the Harrises are wary of invalidating arbitration clauses based upon a lack of mutuality for fear that such an invalidation would be interpreted as being tantamount to a holding that states that arbitration as a means of dispute resolution is less effective or less trustworthy than the judicial system. In other words, lack of a choice of forum is simply not unconscionable enough in this context because arbitration, in the eyes of most courts, is not an inherently inferior methodology of dispute resolution.[58]

Unlike the plaintiffs in *Harris*, the plaintiff in *Randolph* was able to bring a suit based upon the Truth in Lending Act which, as stated above, provides a statutory remedy against unfair or deceptive practices by lenders.[59] In its analysis, the Eleventh Circuit elucidated that when an arbitration agreement serves to defeat the remedial purpose of a statute by saddling consumers with arbitration costs and by preventing consumers from bringing an action, such arbitration clauses are unenforceable.[60] This "unconscionability because of cost" analysis has been utilized by other

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[56] *See, e.g.*, Goodwin v. Ford Motor Credit Co., 970 F. Supp. 1007, 1011-12 (M.D. Ala. 1997) (upholding an arbitration agreement under the theory that parties are not required to have similar remedies in case of breach); Lackey v. Green Tree Fin. Corp., 498 S.E.2d 898, 904-05 (S.C. Ct. App. 1998) (upholding an arbitration agreement between a consumer and lender because the court could not assume that an arbitral forum is prejudicial in comparison to a judicial forum). *But see* Arnold v. United Cos. Lending Corp., 511 S.E.2d 854, 861 (W. Va. 1998) (holding an arbitration clause unconscionable due to an inadequate balance of bargaining power).

[57] *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (stating that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements").

[58] *See id.* at 24-25 (suggesting that arbitration should be accorded the same standing and legitimacy as other forms of dispute resolution by stating that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

[59] *See* Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* (1994 & Supp. III 1997); *see also supra* note 43.

[60] *See* Randolph v. Green Tree Fin. Corp.—Alabama, 178 F.3d 1149, 1156 (11th Cir. 1999) (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991)).

courts[61] and represents a viable means by which consumers can invalidate unfair standardized arbitration clauses in consumer contracts; a cost unconscionability argument is even more compelling if the allegation of a violation of a federal remedial statute is involved with their dispute.[62]

V. CONCLUSION

Thus, it appears that courts will abrogate their proarbitration policy and invalidate arbitration clauses in standardized consumer contracts if consumers can demonstrate prejudice beyond the of lack of a choice regarding forum of dispute resolution. Consumers who are able to demonstrate that a given arbitration clause is "truly" prejudicial, i.e., who are able to demonstrate that an arbitration clause that somehow affects their remedial rights under federal or state law or is unduly costly to them (as the plaintiff in *Randolph* successfully argued), will succeed in their attempts to invalidate consumer contracts containing boilerplate arbitration language. The above conclusion manifests a fair compromise of the judicial system's statutory and precedential obligation to uphold arbitration agreements and their duty to protect consumers' rights. Future case law will further elucidate the parameters of this compromise by the courts and will be instructive to lenders and vendors on how to structure their arbitration clauses so as to avoid a challenge based upon substantive unconscionability by consumers.

Arbitration clauses are becoming increasingly commonplace in consumer contracts such as retail sales contracts,[63] in invoices for products shipped to consumers,[64] and in bank account agreements.[65] The use of arbitration clauses in consumer contracts and the spawn of a proarbitration federal policy has had significant effects upon the way consumers may combat the unfair and deceptive practices of crooked venders and lenders.

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[61] *See, e.g.*, Myers v. Terminex Int'l Co., 697 N.E.2d 277, 280-81 (Ohio Ct. Comm. Pleas 1998) (holding that an arbitration clause charging customers in the form of a nonrefundable filing fee was unconscionable and thus unenforceable).

[62] *See* Miller, *supra* note 2, at 305-06.

[63] *See id.* at 302.

[64] *See id:* (citing Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997)).

[65] *See id.* (citing Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 327 & n.468 (1995); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 54 & n.59).

The facts of *Harris v. Green Tree Financial Corp.*[66] illustrate the means by which courts have condoned the use of arbitration clauses in contracts of adhesion to limit consumers' remedies for unsatisfactory service through mandatory arbitration while preserving the lender's or vendor's right to litigate. Federal proarbitration policy has influenced courts to validate arbitration clauses in most cases.

Harris and similar cases have demonstrated that unconscionability of arbitration clauses within standardized consumer contracts is not so easily argued; the mere existence of an inbalance in bargaining power that exists in favor of the vendor simply is not reason enough for some state and federal jurisdictions to invalidate an arbitration agreement.[67] However, as *Randolph v. Green Tree Financial Corp.—Alabama*[68] demonstrates, if consumers are able to frame their unconscionability argument based upon the inordinate cost to the consumer, or if the arbitration clause violates consumers' rights for redress under a specific statutory regime, a successful invalidation of the arbitration clause in favor of the consumer can be expected.[69]

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[66] 183 F.3d 173 (3d Cir. 1999).

[67] *See id.* at 183.

[68] 178 F.3d 1149 (11th Cir. 1999).

[69] *See id.* at 1159.